

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

---

In the Matter of:

PETITION OF ODYSSEY SERVICES, INC.  
FOR WAIVER OF 47 C.F.R. §64.1200(a)(4)(iv)

GC Docket No. 02-278

GC Docket No. 05-338

---

**PETITION FOR RETROACTIVE WAIVER**

Pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, and Paragraph 30 of the Commission’s Order, CG Docket Nos. 02-278, 05-338, FCC 14-164 (rel. Oct. 30, 2014) (“October 30 Order”), Petitioner, Odyssey Services, Inc. (“Odyssey”) respectfully requests that the Commission grant a retroactive waiver of the opt-out notice requirement in Section 64.1200(a)(4)(iv) of the Commission’s rules, 47 C.F.R. § 64.1200(a)(4)(iv). In the October 30 Order, the Commission granted a retroactive waiver of Section 64.1200(a)(4)(iv) to a group of business-petitioners facing lawsuits that alleged, in part, that the businesses had violated that rule by failing to include specific opt-out language in their faxes even when the faxes were sent with the recipient’s prior express invitation or permission, in writing or otherwise. The Commission determined that, based on potential confusion surrounding the rule, good cause supported a retroactive waiver and that such a waiver was in the public interest. *See* 47 C.F.R. § 1.3; October 30 Order at ¶¶26-28.

Odyssey is now in the same position as the petitioners to whom the Commission granted a retroactive waiver in the October 30 Order. Odyssey faces litigation in the federal

court in the District of New Jersey<sup>1</sup> arising out of the settlement of a class action litigation that was originally filed in the Northern District of Illinois. A copy of the New Jersey litigation is attached as *Exhibit "A"*. A copy of the Illinois litigation is attached as *Exhibit "B"*. The allegation in the New Jersey litigation was that the plaintiffs were forced to settle the class action litigation because Odyssey allegedly supplied opt-out language to the fax in question in violation of Section 64.1200(a)(4)(iv) of the Commission's rules. The allegations are that the opt-out language was supplied to faxes that were both solicited and unsolicited. Like the petitioners in the October 30 Order, therefore, Odyssey faces the prospect of potentially substantial liability for failing to include in solicited faxes the precise opt-out language required by the Commission's rules, even though the Commission found that there was understandable confusion about the applicability of the requirement for that opt-out language. As a party similarly situated to those petitioners who have received the Commission's waivers, Odyssey now asks the Commission to grant it the same retroactive waiver of the same rule for the same reasons that supported a waiver in the October 30 Order.

## I. BACKGROUND

Odyssey Services, Inc. is a New Jersey corporation that provides communications services, including facsimile services, to its clients. It is also involved in designing, developing and rating communication platforms to support key business applications. In the Complaint, plaintiff alleges that Odyssey is alleged to be a "fax broadcaster" under 47 U.S.C. §227. *Id.* at ¶2.

---

<sup>1</sup> The action was originally brought in the Superior Court of New Jersey, Law Division, Somerset County. The case was later removed to the District of New Jersey.

***A. The Telephone Consumer Protection Act and the Commission's Regulations***

The Telephone Consumer Protection Act (“TCPA”) prohibits the use of any telephone facsimile machine, computer, or other device to send an “unsolicited advertisement” to a fax machine. 47 U.S.C. § 227(b)(1)(C). The TCPA was amended in 2005 by the Junk Fax Prevention Act (“JFPA”). *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). In relevant part, the JFPA codified an exception for companies that send fax advertisements to those with whom they have an “established business relationship.” *See* 47 U.S.C. § 227(b)(1)(C)(i).

The Commission amended the rules concerning fax transmissions to reflect the changes brought about by the JFPA. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd. 3787 (2006) (“Junk Fax Order”). Particularly relevant here, the Junk Fax Order adopted a rule stating that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.” 47 C.F.R. §64.1200(a)(4)(iv). At the same time, the Junk Fax Order explained in a footnote that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.” Junk Fax Order, 21 FCC Rcd. at 3810 n.154 (emphasis added).

***B. The Commission's Order of October 30, 2014***

After receiving numerous petitions challenging the application of the opt-out notice requirement to solicited faxes, the Commission issued an Order on October 30, 2014. The

Commission recognized that the “inconsistent footnote” in the Junk Fax Order “caused confusion or misplaced confidence regarding the applicability of [the opt-out notice] requirement.” October 30 Order at ¶¶24, 28. The Commission explained that the footnote “may have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient.” *Id.* at ¶24. In addition, the Commission acknowledged the “the lack of explicit notice” in the notice of proposed rulemaking that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient also “may have contributed to confusion or misplaced confidence.” *Id.* at ¶25. The Commission concluded that “this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.” *Id.* at ¶26. The Commission also found “that granting a retroactive waiver would serve the public interest,” because failure to comply with the rule “could subject parties to potentially substantial damages” and the public interest would not be served by imposing such damages for inadvertent failures to comply with a rule that was confusing. *Id.* at ¶27.

In light of these findings, the Commission granted a retroactive waiver of Section 64.1200(a)(4)(iv) to those parties who had petitioned for such relief—namely, a group of petitioners composed of businesses “subject to . . . a lawsuit in which a class of plaintiffs seek monetary damages under section 227(b) for alleged violations of the opt-out notice requirement for faxes allegedly sent at the request of the recipient.” *Id.* at ¶6; *see also id.* at ¶29. The Commission stated that “[o]ther, similarly situated parties, may also seek waivers such as those granted in this Order” within six months from the date of the Order. *Id.* at ¶30.

II. A RETROACTIVE WAIVER IS WARRANTED BECAUSE PETITIONER IS SIMILARLY SITUATED TO THE PARTIES WHO RECEIVED WAIVERS IN THE OCTOBER 30, 2014 ORDER.

The Commission has the authority to grant a retroactive waiver of its rules pursuant to 47 C.F.R. § 1.3. Here, the Commission has already found that good cause exists for granting a retroactive waiver of Section 64.1200(a)(4)(iv) given confusion surrounding that rule and that the public interest warrants a waiver. Odyssey is in the same position as the parties to whom the Commission granted a waiver, and Odyssey is filing this Petition within six months of the release of the October 30 Order. Thus, a waiver is warranted here as well.

A. *The Commission has already found good cause for granting a retroactive waiver in these circumstances.*

Under section 1.3 of the Commission's rules, the Commission may suspend, revoke, amend, or waive any of its rules at any time "for good cause shown." 47 C.F.R. § 1.3; *see Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009). In addition to a showing of "good cause," waiver also requires that the Commission find that a waiver would be in the public interest. *See* October 30 Order at ¶ 23; *AT&T Corp. v. FCC*, 448 F.3d 426, 433 (D.C. Cir. 2006). As the Commission already found in its October 30 Order, both of these requirements are satisfied in the context of the rule applying the opt-out notice requirement to solicited faxes. *See* October 30 Order at ¶¶26-27.

Good cause has been established due to the inconsistent footnote in the Junk Fax Order. *Id.* at ¶24. That footnote indicated that the opt-out notice requirement applies only to unsolicited advertisements. Junk Fax Order, 21 FCC Rcd. at 3810 n.154. This could reasonably be read to mean that a company need not include an opt-out notice when sending advertisements to customers who have expressly agreed to receive the advertisements—that is,

solicited faxes. *See* October 30 Order at ¶ 24. The Commission’s notice of proposed rulemaking also failed to provide explicit notice that the Commission was planning to require the opt-out notice for solicited faxes. *Id.* at ¶26. As the Commission has already found, “this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.” *Id.*

Furthermore, “granting a retroactive waiver would serve the public interest.” *Id.* at ¶27. Absent a waiver, companies like Odyssey could be subjected to substantial monetary damages and forfeitures under the Communications Act for failing to comply with a rule that the Commission has already decided was the subject of confusion. *Id.* By granting a retroactive waiver, the Commission can ensure that any confusion as to the opt-out notice requirement does not result in the imposition of substantial fines for inadvertent violations. *Id.* The Commission itself has already explained that parties like Odyssey need only show that they are “similarly situated” to the petitioners whose waiver petitions were granted to be entitled to a waiver. *Id.* ¶ 30.

***B. Odyssey Is Similarly Situated To The Petitioners To Whom The Commission Has Granted Retroactive Waivers.***

Odyssey is in the same position as the parties to whom the Commission already granted waivers. Like the petitioners who have already been granted waivers, Odyssey is the target of litigation over its failure to contribute to the settlement of a putative class action lawsuit. *See Exhibit “A”*. The lawsuit asserts the same causes of action against Odyssey that were discussed in the Commission’s October 30 Order granting retroactive waivers. Odyssey is alleged to have supplied a defective opt-out notice on nearly 100,000 facsimile transmissions sent out on May 5,

2009 and May 20, 2009. *Id.* at ¶¶5-26. Plaintiffs seek an award of \$2,400,000 (the amount that they settled the underlying class action purported because of the defective opt-out language). Plaintiffs allege that the underlying class action suit was brought on behalf of the following class:

(a) all persons (b) who on or after a date four years prior to the filing of this action (28 U.S.C. §1658), and on or a date twenty days prior to the filing of this action, (c) were sent faxes on or on behalf of the defendants promoting Meda Pharmaceutical Inc.'s good or services for sale, (d) and who were not provided an "opt-out" notice as described in 47 U.S.C. §227.

*Id.* at ¶14. In short, plaintiffs' lawsuit subjects Odyssey to potentially substantial liability based on the requirement of Section 64.1200(a)(4)(iv) that even solicited faxes must contain the opt-out notice with the specific language as defined in the Commission's rules. As a result, Odyssey is in the same position as the petitioners in the October 30 Order.

Odyssey is in the same position as the parties to whom the Commission already granted waivers for another reason. Plaintiff alleges that *unsolicited* faxes sent by Odyssey also did not contain proper out-opt notices under the TCPA and regulations. *Id., et passim*. Plaintiffs seek an award on this basis as well. However, plaintiffs have refused to provide information as to which of the faxes were solicited and which were not. Odyssey intends to demonstrate that any purportedly unsolicited faxes were in fact the fault of the plaintiffs, who supplied the facsimile lists to Odyssey and who assured Odyssey that the entities on the list had given prior express permission or invitation of the to receive these faxes.

As the Commission has already held, good cause exists for a waiver in these circumstances because the contradictory footnote in the Junk Fax Order reasonably caused confusion about whether the opt-out notice requirement applied to solicited faxes. Similarly,

subjecting Odyssey to substantial monetary damages in these circumstances would not serve the public interest. *See* October 30 Order at ¶27. The TCPA and the Commission's implementing rules are generally intended "to allow consumers to stop unwanted faxes." Junk Fax Order, 21 FCC Rcd. at 3812. But that purpose would not be served by imposing potentially massive penalties on a company like Odyssey for sending faxes with the recipient's prior express invitation or permission, in writing or otherwise, and the only hook for liability is the failure to include precise opt-out language. And that is especially the case where there was confusion surrounding the applicability of the rule requiring that opt-out language. Indeed, because the Commission has already granted retroactive waivers to some petitioners who are situated similarly to Odyssey, denying a waiver here would be all the more "unjust or inequitable." October 30 Order at ¶ 28.

## **CONCLUSION**

Odyssey finds itself in the same position as those petitioners whom the Commission granted a retroactive waiver of the opt-out notice requirement as applied to solicited faxes. Specifically, it faces a lawsuit that seeks substantial damages for alleged violations of a rule that the Commission has already recognized created "confusion [and] misplaced confidence." October 30 Order at ¶27. Applying the opt-out notice requirement to solicited faxes under these circumstances would do more harm than good, while granting a retroactive waiver to prevent the imposition of statutory fines for inadvertent violations would "serve[] the



public interest.” *Id.* Odyssey therefore requests that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) that the Commission has already granted to other, similarly situated parties.

Respectfully submitted,

STEWART BERNSTIEL REBAR & SMITH



DATE: April 14, 2015

---

Cathleen Kelly Rebar, Esquire  
Patrick J. Healey, Esquire  
100 Overlook Center, 2<sup>nd</sup> Floor  
Princeton, NJ 008540  
609-375-7070  
[crebar@sbrslaw.com](mailto:crebar@sbrslaw.com)  
[phealey@sbrslaw.com](mailto:phealey@sbrslaw.com)  
Attorneys for Petitioner,  
Odyssey Services Inc.

# Exhibit A

HINSHAW & CULBERTSON LLP  
800 Third Avenue, 13<sup>th</sup> Floor  
New York, New York 10022  
Tel: (212) 471-6000  
Fax: (212) 435-1166  
By: Benjamin S. Noren, Esq.  
Attorney for Plaintiff  
Meda Pharmaceuticals, Inc.

MEDA PHARMACEUTICALS, INC.,	SUPERIOR COURT OF NEW JERSEY
Plaintiff,	LAW DIVISION - SOMERSET COUNTY
vs.	DOCKET NO. <i>SDM-L-406-14</i>
ODYSSEY SERVICES, INC.,	SUMMONS
Defendant.	

TO: Odyssey Services, Inc.  
106 Apple Street, Floor 2, Suite 221  
Tinton Falls, New Jersey 07724

From The State of New Jersey To The Defendant Named Above:

The plaintiff, named above, has filed a lawsuit against you in the Superior Court of New Jersey. The complaint attached to this summons states the basis for this lawsuit. If you dispute this complaint, you or your attorney must file a written answer or motion and proof of service with the deputy clerk of the Superior Court in the county listed above within 35 days from the date you received this summons, not counting the date you received it. (The address of each deputy clerk of the Superior Court is provided.) If the complaint is one in foreclosure, then you must file your written answer or motion and proof of service with the Clerk of the Superior Court, Hughes Justice Complex, P.O. Box 971, Trenton, NJ 08625-0971. A filing fee payable to the Treasurer, State of New Jersey and a completed Case Information Statement (available from the deputy clerk of the Superior Court) must accompany your answer or motion when it is filed. You must also send a copy of your answer or motion to plaintiff's attorney whose name and address appear above, or to plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve a written answer or motion (with fee of \$135 and completed Case Information Statement) if you want the court to hear your defense.

If you do not file and serve a written answer or motion within 35 days, the court may enter a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment.

130774118v1 2848

If you cannot afford an attorney, you may call the Legal Services office in the county where you live. A list of these offices is provided. If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A list of these numbers is also provided.

Dated: March 25, 2014



Michelle M. Smith, Esq., Clerk  
Superior Court of New Jersey

TO: Odyssey Services, Inc.  
106 Apple Street, Floor 2, Suite 221  
Tinton Falls, New Jersey 07724

130774118v1 2848

HINSHAW & CULBERTSON LLP  
800 Third Avenue, 13<sup>th</sup> Floor  
New York, New York 10022  
Tel: (212) 471-6000  
Fax: (212) 435-1166  
By: Benjamin S. Noren, Esq.  
Attorney for Plaintiff  
Meda Pharmaceuticals, Inc.

FILED  
SEP 11 2006

SOMERSET COUNTY  
CLERK

MEDA PHARMACEUTICALS, INC.,	SUPERIOR COURT OF NEW
Plaintiff,	JERSEY
vs.	LAW DIVISION - SOMERSET
ODYSSEY SERVICES, INC.,	COUNTY
Defendant.	DOCKET NO. <i>SDA-L-406-14</i>
	COMPLAINT

Plaintiff, Meda Pharmaceuticals, Inc. ("Meda"), having its principal office at 265 Davidson Avenue, Somerset, New Jersey 08873, by way of complaint against defendant Odyssey Services, Inc. ("Odyssey"), says upon information and belief as follows:

#### PARTIES

1. Plaintiff, Meda, is a Delaware corporation that has its principal place of business in New Jersey. Meda is engaged in the business of developing and manufacturing specialty pharmaceutical products.

2. Defendant, Odyssey, is a New Jersey corporation that has its principal place of business in this state. Odyssey transmits messages to telephone facsimile machines on behalf of others for a fee. It is a "fax broadcaster" under the implementing regulations for the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. See 47 C.F.R. § 64.1200(f)(7); 71 Fed. Reg. 25,967, 25,971 (May 3, 2006).

130776800 0915109

### JURISDICTION AND VENUE

3. This is an action within the jurisdiction of this Court pursuant to New Jersey Court Rules § 4:3-1(4), because the parties are domiciled in this state and the claims asserted arise under New Jersey law

4. Venue is proper in the Superior Court of New Jersey in Somerset County pursuant to New Jersey Court Rules § 4:3-2(a), because the acts and transactions out of which Meda's claims arise occurred in Somerset County.

### NATURE OF THE COMPLAINT

5. In 2009, Meda sought to increase awareness among pharmacists about Soma 250, a new Meda product that was and is prescribed for musculoskeletal pain. In early 2009, Meda's advertising agency, the Hal Lewis Group, Inc. ("HLG"), developed a notice that was to be faxed to pharmacists to inform them about a promotion in which copays on the Soma 250 product were being waived. Odyssey agreed to use its specialized computer system to fax the announcement to some 48,144 pharmacists listed on a spreadsheet provided by SK&A Information Services, Inc. ("SK&A"). Odyssey also agreed to add to the copay announcement an opt-out notice that would, as required under the TCPA, explain to recipients how they could opt out of receiving future faxes. In two separate fax broadcasts in May 2009, Odyssey used its computer system to transmit the copay announcement, which bore Odyssey's opt-out language, to the fax machines of the thousands of pharmacists on SK&A's spreadsheet.

6. After receiving the Soma 250 faxes, Glen Ellyn Pharmacy, Inc. ("Glen Ellyn"), filed a putative class action in the U.S. District Court for the Northern District of Illinois, alleging that Odyssey's opt-out notice was defective and violated the TCPA, 47 U.S.C. § 227(b). Glen Ellyn brought its claims on behalf of a class of all recipients of faxes regarding Meda

products that contained Odyssey's allegedly defective opt-out notice. Membership in the class was limited to those who received a fax with Odyssey's allegedly defective opt-out language.

7. Subsequently, Meda, HLG, SK&A, and Pharmacy & Healthcare Communications LLC ("Pharmacy Times"), agreed to settle Glen Ellyn's claims on a classwide basis by creating a \$2,400,000 settlement fund. In November 2012, the district court granted final approval to the class settlement and the defendants subsequently paid the settlement amount in full. Because Odyssey declined to contribute meaningfully to the settlement, Meda took an assignment of all claims that the other defendants have against Odyssey and now brings this action to assert those claims and hold Odyssey liable for the full amount of the \$2,400,000 class settlement.

8. Odyssey should be held liable for the full amount of the settlement because it is a professional fax broadcaster that holds itself out as an expert in fax broadcasting. In addition, Odyssey was knowledgeable about the requirements of the TCPA, and Meda and the settling defendants relied upon Odyssey to add a compliant opt-out notice to the Soma 250 flyers.

#### **GLEN ELLYN'S AMENDED COMPLAINT**

9. In its amended complaint (Docket Entry # ("DE") 47), Glen Ellyn alleged that Meda and HLG (Meda's advertising agency) violated the TCPA, 47 U.S.C. § 227, by using a facsimile machine to send Glen Ellyn two unsolicited faxes concerning Soma 250.

10. Glen Ellyn contended that, by sending the faxes regarding Soma 250, Meda and HLG also violated the Illinois Consumer Fraud Act ("ICFA") and committed the tort of common-law conversion.

11. Glen Ellyn allegedly received the Soma 250 faxes on May 5, 2009 and May 20, 2009.

12. According to the amended complaint, the faxes at issue announced the availability of a coupon that covered the patient copay for the Soma 250 product.

13. Glen Ellyn alleged that HLG acted as the authorized agent of Meda in sending the faxes or causing the faxes to be sent.

14. Glen Ellyn sought to bring its claims on behalf of the following class:

(a) all persons (b) who, on or after a date four years prior to the filing of this action (28 U.S.C. §1658), and on or before a date 20 days following the filing of this action, (c) were sent faxes by or on behalf of defendants promoting Meda Pharmaceuticals, Inc.'s goods or services for sale (d) and who were not provided an "opt out" notice as described in 47 U.S.C. §227. (Doc. #1 ¶26, #47 at ¶30).

#### TRANSMISSION OF FAXES CONCERNING SOMA 250

15. In or about early 2009, HLG developed a program in which pharmacists would be sent faxes announcing that Meda had made available a coupon that covered the patient copay for the Soma 250 product.

16. In February 2009, representatives of HLG attended a presentation given by a third-party defendant in the *Glen Ellyn* action, Pharmacy Times, during which a representative of Pharmacy Times stated that it could assist HLG and Meda in transmitting the copay announcement to pharmacists on a list maintained by Pharmacy Times.

17. HLG hired Pharmacy Times to fax the copay announcement to pharmacies and pharmacists.

18. Pharmacy Times then entered into a contract with SK&A under which the latter provided the list of facsimile numbers of the pharmacists and pharmacies that ultimately received the copay announcement for Soma 250.

19. After Pharmacy Times entered into discussions with SK&A, Pharmacy Times was provided with two separate contracts, one of which was a "Service Provider Agreement" between SK&A and Pharmacy Times, and one of which was captioned, "End User Service Agreement"



between Pharmacy Times and Odyssey ("Odyssey Agreement"). The agreements provided that Odyssey would use its computer system to transmit or "broadcast" the copay announcement, on behalf of Pharmacy Times, to the fax numbers of the pharmacists on SK&A's list.

20. At the request of SK&A, Odyssey agreed to add a legally compliant "opt-out line" to the Soma 250 document before it transmitted the document to the fax machines of the pharmacists on SK&A's list. Odyssey also agreed to send the copay announcement to the facsimile machines of the pharmacists on SK&A's list. Through its website, Odyssey advertises that it handles opt outs under the TCPA in connection with facsimile notification campaigns. Under the heading, "Automated Opt-Out," the website states, "Provide an easy way for your recipients to remove their fax numbers from your list."

21. Thereafter, pursuant to its agreement with SK&A, Odyssey added the opt-out notice that appeared on the Soma 250 facsimile. This language stated that recipients could opt out of receiving faxes by calling a toll-free number. Odyssey then sent the Soma 250 facsimile to the fax machines of the pharmacists on SK&A's list in two broadcasts. Odyssey charged SK&A for these services.

22. In addition to agreeing to use its computer system to send the Soma 250 documents to the fax machines of the pharmacists on SK&A's list, Odyssey agreed to maintain a list of the pharmacists who called the toll-free number and opted out in response to receiving the Soma 250 fax.

23. Odyssey's principal, Dennis Schmaltz, admitted at his deposition in the *Glen Ellyn* litigation that the toll-free number that appeared on the opt-out notice was Odyssey's own number, and he testified in detail about how Odyssey oversaw the opt-out process for the Soma 250 project.

24. In its complaint, Glen Ellyn alleged that Odyssey's opt-out notice violated the TCPA because it did not also provide a toll-free number to which opt-out requests could be faxed. The opt-out notice was one of the criteria for Glen Ellyn's class definition.

25. Meda, HLG, Pharmacy Times, and SK&A all relied upon Odyssey to add a legally compliant opt-out notice to the Soma 250 flyer before it was faxed to the pharmacists on SK&A's list.

26. Pharmacy Times and SK&A have assigned to Meda all claims that they have against Odyssey in connection with faxes related to the Soma 250 faxes that were transmitted by Odyssey.

**AS AND FOR A FIRST CAUSE OF ACTION AGAINST ODYSSEY**  
(Odyssey's Breach of the Odyssey-Pharmacy Times Contract)

27. Meda restates and incorporates by reference the allegations contained in Paragraphs 1-26 as if fully set forth herein.

28. On or around April 16, 2009, Pharmacy Times and Odyssey entered into the End User Agreement. The purpose of the End User Agreement was, among other things, for Odyssey to perform facsimile broadcasting services, including providing opt-out language and overseeing the campaign's opt-out process in full compliance with federal and state laws.

29. Pharmacy Times properly performed all of its obligations and requirements under the End User Agreement.

30. Odyssey breached the End User Agreement by failing to perform facsimile broadcasting services, including providing opt-out language and overseeing the campaign's opt-out process, in full compliance with federal and state laws.

31. Odyssey's breach of the End User Agreement has damaged the settling defendants, including Meda and Pharmacy Times. Due to Odyssey's breach, settling defendants had to enter into and fund a \$2,400,000 settlement of Glen Ellyn's class claims in this action.

WHEREFORE, Meda Pharmaceuticals Inc. demands judgment in its favor and against Odyssey Services, Inc. in an amount in excess of \$2,400,000, attorneys' fees, interest and the cost of this suit, and such other legal and equitable relief as may be proper in the circumstances.

**AS AND FOR A SECOND CAUSE OF ACTION AGAINST ODYSSEY**  
(Breach of Contract against Odyssey under the Odyssey-SK&A Service Agreement)

32. Meda restates and incorporates by reference the allegations contained in Paragraphs 1-31 as if fully set forth herein.

33. SK&A and Odyssey entered into an agreement whereby Odyssey agreed to transmit the Soma 250 document to the pharmacists on SK&A's list; SK&A specifically requested that Odyssey include its opt-out line on the facsimiles, and Odyssey agreed to do so. Odyssey had a contractual obligation to perform its facsimile broadcasting services in compliance with the law and to supply a compliant opt-out line. SK&A performed its obligations under the agreement by supplying Odyssey with the Soma 250 document and paying Odyssey for its services.

34. Odyssey breached the agreement by adding an opt-out notice that led to the *Glen Ellyn* litigation. Odyssey has a duty to compensate Meda for the costs it incurred as a result of Odyssey's breach of its agreement with SK&A.

35. By virtue of its obligations under the agreement, Odyssey is obligated to pay Meda, in its own right and as the assignee of Pharmacy Times and SK&A, damages for the expenses that have been incurred in defending and settling the class action.

WHEREFORE, Meda Pharmaceuticals Inc. prays that this Honorable Court enter judgment against Odyssey and in favor of Meda, awarding Meda the full amount of the \$2,400,000 class settlement, plus all expenses and costs that Meda has incurred in defending and/or settling this action and prosecuting its claims against Odyssey.

**AS AND FOR A THIRD CAUSE OF ACTION AGAINST ODYSSEY**  
(Duty of Indemnification Implied by Odyssey's Special Relationship to SK&A, Pharmacy Times, and Meda)

36. Meda restates and incorporates by reference the allegations contained in Paragraphs 1-35 as if fully set forth herein.

37. SK&A and Pharmacy Times relied upon Odyssey's professions of expertise in the field of facsimile broadcasting when they allowed Odyssey to add the opt-out notice and then transmit the Soma 250 faxes to the pharmacists on SK&A's list. They also relied on Odyssey's representation and agreement that it would supply a compliant opt-out notice.

38. By holding itself out as an expert in fax broadcasting and agreeing to supply the opt-out notice that was placed on the Soma 250 faxes, a special relationship arose between Odyssey, on the one hand, and SK&A, Pharmacy Times, and Meda, on the other.

39. Because of the special relationship, Odyssey had and has a duty to indemnify Meda for the full amount of the class settlement.

40. By virtue of the assignment of claims by Pharmacy Times and SK&A to Meda, and by virtue of the special relationship that exists between the parties, Odyssey is obligated to indemnify Meda, in its own right and as the assignee of Pharmacy Times and SK&A, for the expenses that were incurred in defending and settling the class action.

WHEREFORE, Meda Pharmaceuticals Inc. prays that this Honorable Court enter judgment against Odyssey and in favor of Meda, awarding Meda the full amount of the

\$2,400,000 class settlement, plus all expenses and costs that Meda has incurred in defending and/or settling this action and prosecuting its claims against Odyssey.

**AS AND FOR A FOURTH CAUSE OF ACTION AGAINST ODYSSEY**  
(Misrepresentation)

41. Meda restates and incorporates by reference the allegations contained in Paragraphs 1-40 as if fully set forth herein.

42. Odyssey is in the business of supplying information and advice for the guidance of others in their business operations and business affairs.

43. Odyssey represented in or around April 2009 that it would add legally compliant opt-out language to the Soma 250 flyer before that document was sent to the fax machines of the pharmacists on SK&A's list.

44. When they allowed Odyssey to transmit the Soma 250 document to the pharmacists on SK&A's list, SK&A and Pharmacy Times relied on Odyssey's representation that it would supply an adequate opt-out notice. They also relied on Odyssey's general expertise as a fax broadcaster.

45. Glen Ellyn alleged, however, that opt-out language that Odyssey supplied violated the TCPA. Defendants incurred \$2,400,000 to settle the class claims that Glen Ellyn brought based on Odyssey's defective opt-out language, as well as thousands of dollars in litigation expenses.

WHEREFORE, Meda Pharmaceuticals Inc. prays that this Honorable Court enter judgment against Odyssey Services, Inc. and in favor of Meda, awarding Meda the full amount of the \$2,400,000 class settlement, along with all costs and fees that Meda and the other settling defendants have incurred in defending against Glen Ellyn's suit and in prosecuting claims against Odyssey.

**DEMAND FOR TRIAL BY JURY**

Plaintiff Meda Pharmaceuticals Inc. demands trial by jury as to all issues involved herein.

**DESIGNATION OF TRIAL COUNSEL**

Pursuant to R.4:25-4, Benjamin S. Noren, Esq. is hereby designated Trial Counsel of this matter.

HINSHAW & CULBERTSON LLP  
Attorneys for Plaintiff  
MEDA PHARMACEUTICALS INC.

By:   
Benjamin S. Noren, Esq.

Dated: March 25, 2014

**RULE 4:5-1 CERTIFICATION**

To the best of my knowledge, at this time this matter is not the subject of any other action pending in any court or a pending arbitration proceeding, and no other action or arbitration is contemplated. Upon information and belief, there are no other persons, which need to be joined in this action at this time.


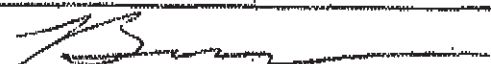
HINSHAW & CULBERTSON LLP  
Attorneys for Plaintiff  
MEDA PHARMACEUTICALS INC.

By:   
Benjamin S. Noren, Esq.

Dated: March 25, 2014



**Appendix XII-B1**

	<b>CIVIL CASE INFORMATION STATEMENT (CIS)</b>		<b>FOR USE BY CLERK'S OFFICE ONLY</b>	
	Use for initial Law Division Civil Part pleadings (not motions) under <i>Rule 4:5-1</i> <b>Pleading will be rejected for filing, under <i>Rule 1:5-6(c)</i>,                  if information above the black bar is not completed                  or attorney's signature is not affixed</b>		PAYMENT TYPE: <input type="checkbox"/> CK <input type="checkbox"/> CG <input type="checkbox"/> CA CHG/CK NO.: _____ AMOUNT: _____ OVERPAYMENT: _____ BATCH NUMBER: _____	
	ATTORNEY / PRO SE NAME Benjamin Noren		TELEPHONE NUMBER (212) 471-6244	
	COUNTY OF VENUE Somerset		DOCKET NUMBER (when available)	
FIRM NAME (if applicable) Hinshaw & Culbertson LLP			DOCUMENT TYPE Summons and Complaint	
OFFICE ADDRESS 800 Third Avenue, 13th Floor New York, New York 10022			JURY DEMAND <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
NAME OF PARTY (e.g., John Doe, Plaintiff) Meda Pharmaceuticals, Inc.		CAPTION Meda Pharmaceuticals, Inc. v. Odyssey Services, Inc.		
CASE TYPE NUMBER (See reverse side for listing) 599	HURRICANE SANDY RELATED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	IS THIS A PROFESSIONAL MALPRACTICE CASE? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IF YOU HAVE CHECKED "YES," SEE N.J.S.A. 2A:53A-27 AND APPLICABLE CASE LAW REGARDING YOUR OBLIGATION TO FILE AN AFFIDAVIT OF MERIT. IF YES, LIST DOCKET NUMBERS		
RELATED CASES PENDING? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		DO YOU ANTICIPATE ADDING ANY PARTIES (arising out of same transaction or occurrence)? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
		NAME OF DEFENDANT'S PRIMARY INSURANCE COMPANY (if known) <input type="checkbox"/> NONE <input checked="" type="checkbox"/> UNKNOWN		
THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE.				
CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION				
DO PARTIES HAVE A CURRENT, PAST OR RECURRENT RELATIONSHIP? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		IF YES, IS THAT RELATIONSHIP: <input type="checkbox"/> EMPLOYER/EMPLOYEE <input type="checkbox"/> FRIEND/NEIGHBOR <input type="checkbox"/> OTHER (explain) <input type="checkbox"/> FAMILIAL <input checked="" type="checkbox"/> BUSINESS		
DOES THE STATUTE GOVERNING THIS CASE PROVIDE FOR PAYMENT OF FEES BY THE LOSING PARTY? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO				
USE THIS SPACE TO ALERT THE COURT TO ANY SPECIAL CASE CHARACTERISTICS THAT MAY WARRANT INDIVIDUAL MANAGEMENT OR ACCELERATED DISPOSITION    				
DO YOU OR YOUR CLIENT NEED ANY DISABILITY ACCOMMODATIONS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		IF YES, PLEASE IDENTIFY THE REQUESTED ACCOMMODATION		
WILL AN INTERPRETER BE NEEDED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		IF YES, FOR WHAT LANGUAGE?		
I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with <i>Rule 1:38-7(b)</i> .				
ATTORNEY SIGNATURE: 				





# CIVIL CASE INFORMATION STATEMENT (CIS)

Use for initial pleadings (not motions) under Rule 4:5-1

## CASE TYPES (Choose one and enter number of case type in appropriate space on the reverse side.)

### Track I - 150 days' discovery

- 151 NAME CHANGE
- 175 FORFEITURE
- 302 TENANCY
- 399 REAL PROPERTY (other than Tenancy, Contract, Condemnation, Complex Commercial or Construction)
- 502 BOOK ACCOUNT (debt collection matters only)
- 505 OTHER INSURANCE CLAIM (including declaratory judgment actions)
- 506 PIP COVERAGE
- 510 UM or UIM CLAIM (coverage issues only)
- 511 ACTION ON NEGOTIABLE INSTRUMENT
- 512 LEMON LAW
- 801 SUMMARY ACTION
- 802 OPEN PUBLIC RECORDS ACT (summary action)
- 999 OTHER (briefly describe nature of action)

### Track II - 300 days' discovery

- 305 CONSTRUCTION
- 509 EMPLOYMENT (other than CEPA or LAD)
- 599 CONTRACT/COMMERCIAL TRANSACTION
- 603N AUTO NEGLIGENCE - PERSONAL INJURY (non-verbal threshold)
- 603Y AUTO NEGLIGENCE - PERSONAL INJURY (verbal threshold)
- 605 PERSONAL INJURY
- 610 AUTO NEGLIGENCE - PROPERTY DAMAGE
- 621 UM or UIM CLAIM (includes bodily injury)
- 699 TORT - OTHER

### Track III - 450 days' discovery

- 005 CIVIL RIGHTS
- 301 CONDEMNATION
- 602 ASSAULT AND BATTERY
- 604 MEDICAL MALPRACTICE
- 606 PRODUCT LIABILITY
- 607 PROFESSIONAL MALPRACTICE
- 608 TOXIC TORT
- 609 DEFAMATION
- 616 WHISTLEBLOWER / CONSCIENTIOUS EMPLOYEE PROTECTION ACT (CEPA) CASES
- 617 INVERSE CONDEMNATION
- 618 LAW AGAINST DISCRIMINATION (LAD) CASES

### Track IV - Active Case Management by Individual Judge / 450 days' discovery

- 166 ENVIRONMENTAL/ENVIRONMENTAL COVERAGE LITIGATION
- 303 MT. LAUREL
- 508 COMPLEX COMMERCIAL
- 513 COMPLEX CONSTRUCTION
- 514 INSURANCE FRAUD
- 620 FALSE CLAIMS ACT
- 701 ACTIONS IN LIEU OF PREROGATIVE WRITS

### Multicounty Litigation (Track IV)

- |  |   |
|--|---|
| 268 HORMONE REPLACEMENT THERAPY (HRT)  | 288 PRUDENTIAL TORT LITIGATION                            |
| 271 ACCUTANE/ISOTRETINOIN              | 289 REGLAN  |
| 274 RISPERDAL/SERDQUEL/ZYPREXA         | 290 POMPTON LAKES ENVIRONMENTAL LITIGATION                |
| 278 ZOMETAXAREDA                       | 291 PELVIC MESH/GYNECARE                                  |
| 279 GADOLINIUM                         | 292 PELVIC MESH/HEARD                                     |
| 281 BRISTOL-MYERS SQUIBB ENVIRONMENTAL | 293 DEPUY ASR HIP IMPLANT LITIGATION                      |
| 282 FOSAMAX                            | 295 ALLODERM REGENERATIVE TISSUE MATRIX                   |
| 284 NUVARING                           | 296 STRYKER REJUVENATE/ABG II MODULAR HIP STEM COMPONENTS |
| 285 STRYKER TRIDENT HIP IMPLANTS       | 297 MIRENA CONTRACEPTIVE DEVICE                           |
| 286 LEVAQUIN                           | 601 ASBESTOS  |
| 287 YAZ/YASMIN/OCELLA                  | 623 PROPECIA  |

If you believe this case requires a track other than that provided above, please indicate the reason on Side 1, in the space under "Case Characteristics."

Please check off each applicable category ☐ Putative Class Action ☐ Title 59

SOMERSET COUNTY SUPERIOR COURT  
40 NORTH BRIDGM STREET  
1ST FLR PO BOX 3000  
SOMERVILLE NJ 08876-1262

TRACK ASSIGNMENT NOTICE

COURT TELEPHONE NO. (908) 231-7054  
COURT HOURS 8:30 AM - 4:30 PM

DATE: MARCH 28, 2014  
RE: MSDA PHARMACEUTICALS VS ODYSSEY SERVICES  
DOCKET: SOM L -000496 14

THE ABOVE CASE HAS BEEN ASSIGNED TO: TRACK 2.

DISCOVERY IS 300 DAYS AND RUNS FROM THE FIRST ANSWER OR 90 DAYS  
FROM SERVICE ON THE FIRST DEPENDANT, WHICHEVER COMES FIRST.

THE PRETRIAL JUDGE ASSIGNED IS: HON THOMAS C. MILLER

IF YOU HAVE ANY QUESTIONS, CONTACT TEAM 002  
AT: (908) 203-6034.

IF YOU BELIEVE THAT THE TRACK IS INAPPROPRIATE YOU MUST FILE A  
CERTIFICATION OF GOOD CAUSE WITHIN 30 DAYS OF THE FILING OF YOUR PLEADING.  
PLAINTIFF MUST SERVE COPIES OF THIS FORM ON ALL OTHER PARTIES IN ACCORDANCE  
WITH R.4:5A-2.

ATTENTION:

ATT: BENJAMIN S. NOREN  
HINSHAW & CULBERTSON LLP  
800 THIRD AVENUE  
13TH FLOOR  
NEW YORK NY 10022

JUTKNO1

# Exhibit B

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

GLEN ELLYN PHARMACY, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	09 C 4100
	)	
MEDA PHARMACEUTICALS, INC.	)	Judge Joan B. Gottschall
THE HAL LEWIS GROUP, INC.,	)	
and JOHN DOES 1-10,	)	
	)	
Defendants.	)	

**FIRST AMENDED COMPLAINT – CLASS ACTION**

**INTRODUCTION**

1. Plaintiff Glen Ellyn Pharmacy, Inc. brings this action to secure redress for the actions of defendant Meda Pharmaceuticals, Inc., and the Hal Lewis Group, Inc. in sending or causing the sending of unsolicited advertisements to telephone facsimile machines in violation of the Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”), the Illinois Consumer Fraud Act, 815 ILCS 505/2 (“ICFA”), and the common law.

2. The TCPA expressly prohibits unsolicited fax advertising. Unsolicited fax advertising damages the recipients. The recipient is deprived of its paper and ink or toner and the use of its fax machine. The recipient also wastes valuable time it would have spent on something else. Unsolicited faxes prevent fax machines from receiving and sending authorized faxes, cause wear and tear on fax machines, and require labor to attempt to identify the source and purpose of the unsolicited faxes.

### **PARTIES**

3. Plaintiff Glen Ellyn Pharmacy, Inc. is a corporation with offices in the Chicago metropolitan area, where it maintains telephone facsimile equipment.

4. Defendant Meda Pharmaceuticals, Inc. is a Delaware corporation that does business in Illinois. Its registered agent and office is CT Corporation System, 208 S. LaSalle St., Suite 814, Chicago, IL 60604.

5. Defendant Hal Lewis Group is a Pennsylvania corporation with offices at 1700 Market Street, Floor 6, Philadelphia, PA 19103-3909.

6. Defendants John Does 1-10 are other natural or artificial persons that were involved in the sending of the facsimile advertisements described below. Plaintiff does not know who they are.

### **JURISDICTION AND VENUE**

7. This Court has subject matter jurisdiction under 28 U.S.C. §§1331 and 1367.

8. Venue and personal jurisdiction in this District are proper because:

a. Have committed tortious acts in Illinois by causing the transmission of unlawful communications into the state.

b. Have transacted business in Illinois.

### **FACTS**

9. On May 5, 2009, plaintiff Glen Ellyn Pharmacy, Inc. received the unsolicited fax advertisement attached as Exhibit A on its facsimile machine.

10. On May 20, 2009, plaintiff Glen Ellyn Pharmacy, Inc. received the

unsolicited fax advertisement attached as Exhibit B on its facsimile machine.

11. Discovery may reveal the transmission of additional faxes as well.

12. Defendants Meda Pharmaceuticals, Inc. and the Hal Lewis Group, Inc. are responsible for sending or causing the sending of the faxes.

13. Meda Pharmaceuticals, Inc. and the Hal Lewis Group, Inc. entered into an agreement which led to the sending of the faxes.

14. The Hal Lewis Group, Inc. acted as the authorized agent of Meda Pharmaceuticals, Inc. in sending or causing the sending of the faxes

15. Defendant Meda Pharmaceuticals, Inc., as the entity whose products or services were advertised in the faxes, derived economic benefit from the sending of the faxes.

16. Each fax refers to a website used by defendant Meda Pharmaceuticals, Inc.

17. Plaintiff had no prior relationship with defendant and had not authorized the sending of fax advertisements to plaintiff.

18. The faxes have a “remove” number at the bottom that is associated with the mass broadcasting of advertising faxes.

19. On information and belief, the faxes attached hereto were sent as part of a mass broadcasting of faxes.

20. On information and belief, defendants have transmitted similar unsolicited fax advertisements to at least 40 other persons in Illinois.

21. There is no reasonable means for plaintiff or other recipients of defendants’ unsolicited advertising faxes to avoid receiving illegal faxes. Fax machines must be left on and ready to receive the urgent communications authorized by their owners.

22. Furthermore, the “opt out notice” required by the TCPA even when faxes are sent with consent or pursuant to an established business relationship was not provided in the faxes at issue.

**COUNT I – TCPA**

23. Plaintiff incorporates ¶¶ 1-22.

24. The TCPA makes unlawful the “use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine ...” 47 U.S.C. §227(b)(1)(C).

25. The TCPA, 47 U.S.C. §227(b)(3), provides:

**Private right of action.**

**A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State–**

**(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,**

**(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or**

**(C) both such actions.**

**If the Court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the subparagraph (B) of this paragraph.**

26. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes, in the form of paper and ink or toner consumed as a result. Furthermore, plaintiff’s statutory right of privacy was invaded.

27. Plaintiff and each class member is entitled to statutory damages.
28. Defendants violated the TCPA even if their actions were only negligent.
29. Defendants should be enjoined from committing similar violations in the

future.

### **CLASS ALLEGATIONS**

30. Plaintiff brings this claim on behalf of a class, consisting of (a) all persons (b) who, on or after a date four years prior to the filing of this action (28 U.S.C. §1658), and on or before a date 20 days following the filing of this action, (c) were sent faxes by or on behalf of defendants promoting Meda Pharmaceuticals, Inc.'s goods or services for sale (d) and who were not provided an "opt out" notice as described in 47 U.S.C. §227.

31. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

32. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendants engaged in a pattern of sending unsolicited fax advertisements;
- b. The manner in which defendants compiled or obtained their list of fax numbers;
- c. Whether defendants thereby violated the TCPA;
- d. Whether defendants thereby engaged in unfair acts and practices, in violation of the ICFA.



e. Whether defendants thereby converted the property of plaintiff.

33. Plaintiff will fairly and adequately protect the interests of the class.

Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

34. A class action is an appropriate method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendants is small because it is not economically feasible to bring individual actions.

35. Several courts have certified class actions under the TCPA. Sadowski v. Med1 Online, LLC, 07 C 2973, 2008 U.S. Dist. LEXIS 41766 (N.D.Ill., May 27, 2008); Hinman v. M & M Rental Ctr., 06 C 1156, 2008 U.S. Dist. LEXIS 27835 (N.D.Ill., April 7, 2008); Kavu, Inc. v. Omnipak Corp., 246 F.R.D. 642 (W.D.Wash. 2007); Gortho, Ltd., v. Websolv, 03 CH 15615 (Cir. Ct. Cook Co., March 6, 2008); Travel 100 Group, Inc. v. Empire Cooler Service, Inc., 03 CH 14510, 2004 WL 3105679 (Cook Co. Cir. Ct., Oct. 19, 2004); Rawson v. C.P. Partners LLC, 03 CH 14510 (Cook Co. Cir. Ct., Sept. 30, 2005); Lampkin v. GGH, Inc., 146 P.3d 847 (Okla. Ct. App. 2006); Display South, Inc. v. Express Computer Supply, Inc., 961 So.2d 451, 455 (La. App. 1<sup>st</sup> Cir. 2007); Display South, Inc. v. Graphics House Sports Promotions, Inc., 992 So. 2d 510 (La. App. 1<sup>st</sup> Cir. 2008); ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc., 203 Ariz. (App.) 94, 50 P.3d 844 (2002); Core Funding Group, LLC v. Young, 792 N.E.2d 547 (Ind.App. 2003); Nicholson v. Hooters of Augusta, Inc., 245 Ga.App. 363, 537 S.E.2d 468 (2000) (private class actions); see State of Texas v. American

Blast Fax, Inc., 164 F. Supp. 2d 892 (W.D. Tex. 2001) (state enforcement action).

36. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendants for:

- a. Actual damages;
- b. Statutory damages;
- c. An injunction against the further transmission of unsolicited fax advertising;
- d. Costs of suit;
- e. Such other or further relief as the Court deems just and proper.

**COUNT II – ILLINOIS CONSUMER FRAUD ACT**

37. Plaintiff incorporates ¶¶ 1-22.

38. Defendants engaged in unfair acts and practices, in violation of ICFA § 2, 815 ILCS 505/2, by sending unsolicited fax advertising to plaintiff and others.

39. Unsolicited fax advertising is contrary to the TCPA and also Illinois public policy, as set forth in 720 ILCS 5/26-3(b), which makes it a petty offense to transmit unsolicited fax advertisements to Illinois residents.

40. Defendants engaged in an unfair practice by engaging in conduct that is contrary to public policy, unscrupulous, and caused injury to recipients of their advertising.

41. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes, in the form of paper and ink or toner consumed as a result.

42. Defendants engaged in such conduct in the course of trade and commerce.

43. Defendants' conduct caused recipients of their advertising to bear the cost thereof. This gave defendants an unfair competitive advantage over businesses that advertise lawfully, such as by direct mail. For example, an advertising campaign targeting one million recipients would cost \$500,000 if sent by U.S. mail but only \$20,000 if done by fax broadcasting. The reason is that instead of spending \$480,000 on printing and mailing his ad, the fax broadcaster misappropriates the recipients' paper and ink. "Receiving a junk fax is like getting junk mail with the postage due". Remarks of Cong. Edward Markey, 135 Cong Rec E 2549, Tuesday, July 18, 1989, 101st Cong. 1st Sess.

44. Defendants' shifting of advertising costs to plaintiff and the class members in this manner makes such practice unfair. In addition, defendants' conduct was contrary to public policy, as established by the TCPA and Illinois statutory and common law.

45. Defendants should be enjoined from committing similar violations in the future.

### **CLASS ALLEGATIONS**

46. Plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers (b) who, on or after a date 3 years prior to the filing of this action, and on or before a date 20 days following the filing of this action, (c) were sent faxes by or on behalf of defendants promoting Meda Pharmaceuticals, Inc.'s goods or services for sale (d) and who were not provided an "opt out" notice as described in 47 U.S.C. §227.

47. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

48. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendants engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendants thereby violated the TCPA;
- c. Whether defendants thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendants thereby converted the property of plaintiff.

49. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

50. A class action is an appropriate method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendants is small because it is not economically feasible to bring individual actions.

51. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendants for:

- a. Appropriate damages;

- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Attorney's fees, litigation expenses and costs of suit;
- d. Such other or further relief as the Court deems just and proper.

### **COUNT III – CONVERSION**

52. Plaintiff incorporates ¶¶ 1-22.

53. By sending plaintiff and the class members unsolicited faxes, defendants converted to their own use ink or toner and paper belonging to plaintiff and the class members.

54. Immediately prior to the sending of the unsolicited faxes, plaintiff and the class members owned and had an unqualified and immediate right to the possession of the paper and ink or toner used to print the faxes.

55. By sending the unsolicited faxes, defendants appropriated to their own use the paper and ink or toner used to print the faxes and used them in such manner as to make them unusable. Such appropriation was wrongful and without authorization.

56. Defendants knew or should have known that such appropriation of the paper and ink or toner was wrongful and without authorization.

57. Plaintiff and the class members were deprived of the paper and ink or toner, which could no longer be used for any other purpose. Plaintiff and each class member thereby suffered damages as a result of receipt of the unsolicited faxes.

58. Defendants should be enjoined from committing similar violations in the future.

### **CLASS ALLEGATIONS**

59. Plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers (b) who, on or after a date 5 years prior to the filing of this action and on or before a date 20 days following the filing of this action, (c) were sent faxes by or on behalf of defendants promoting Meda Pharmaceuticals, Inc.'s goods or services for sale (d) and who were not provided an "opt out" notice as described in 47 U.S.C. §227.

60. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

61. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendants engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendants thereby violated the TCPA;
- c. Whether defendants thereby committed the tort of conversion;
- d. Whether defendants thereby engaged in unfair acts and practices, in violation of the ICFA.
- e. Whether defendants thereby converted the property of plaintiff.

62. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

63. A class action is an appropriate method for the fair and efficient

adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendants is small because it is not economically feasible to bring individual actions.

64. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendants for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

/s/ Daniel A. Edelman  
Daniel A. Edelman

Daniel A. Edelman  
Michelle R. Teggelaar  
Julie Clark  
Heather A. Kolbus  
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC  
120 S. LaSalle Street, 18th floor  
Chicago, Illinois 60603  
(312) 739-4200  
(312) 419-0379 (FAX)  
Atty. No. 41106

T:\23000\Pleading\RevisedAmended Complaint\_Pleading.WPD

**NOTICE OF LIEN AND ASSIGNMENT**

Please be advised that we claim a lien upon any recovery herein for 1/3 or such amount as a court awards. All rights relating to attorney's fees have been assigned to counsel.

/s/ Daniel A. Edelman  
Daniel A. Edelman

Daniel A. Edelman  
EDELMAN, COMBS, LATTURNER  
& GOODWIN, LLC  
120 S. LaSalle Street, 18th Floor  
Chicago, Illinois 60603  
(312) 739-4200  
(312) 419-0379 (FAX)



**CERTIFICATE OF SERVICE**

I, Daniel A. Edelman, certify that on May 21, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Eric L. Samore  
Molly A. Arranz  
Erin A. Walsh  
SmithAmundsen LLC  
150 North Michigan Avenue  
Suite 3300  
Chicago, IL 60601  
[esamore@osalaw.com](mailto:esamore@osalaw.com)  
[marranz@osalaw.com](mailto:marranz@osalaw.com)  
[ewalsh@salawus.com](mailto:ewalsh@salawus.com)

/s/ Daniel A. Edelman  
Daniel A. Edelman

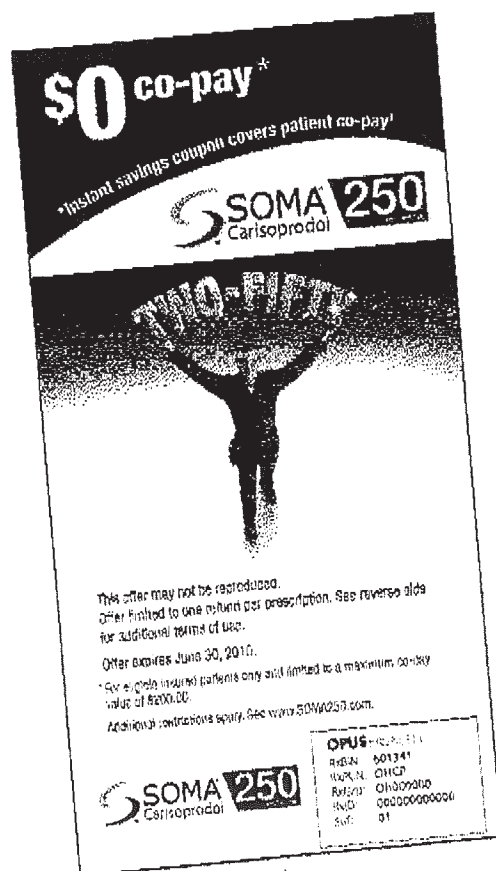
I further certify that, on this date or as soon thereafter as service may be effectuated, I will cause to be served a true and accurate copy of the following document via process server upon the following party:

The Hal Lewis Group  
c/o President David W. Anstice  
1700 Market Street, Floor 6  
Philadelphia, PA 19103-3909

# Attention Pharmacists:

# \$0 co-pay\*

*\*Instant Savings Coupon Covers Patient Co-Pay†*



There is no generic substitute for SOMA® 250 mg.

## \$0 co-pay coupons are available online!

Patients are heading your way. Print your coupons  
now at [www.SOMA250.com](http://www.SOMA250.com). Full terms and  
conditions are also available online.

†The \$0 co-pay offer is for eligible 3rd party insured patients only and limited to a maximum  
co-pay value of \$200.00. Additional restrictions apply. See [www.SOMA250.com](http://www.SOMA250.com).

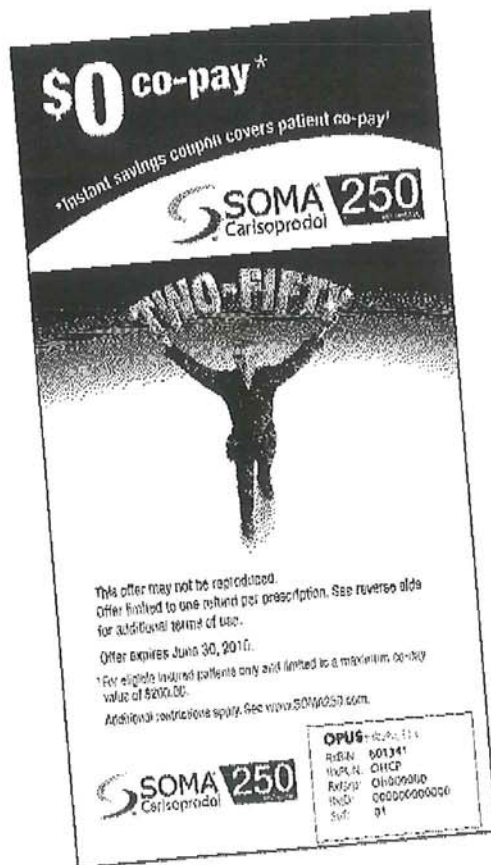
**MEDA**  
PHARMACEUTICALS  
Meda Pharmaceuticals Inc.  
Somerset, New Jersey 08873-4120

© 2009 Meda Pharmaceuticals Inc. All rights reserved. [www.SOMA250.com](http://www.SOMA250.com) SOM9015 4/09

# Attention Pharmacists:

# \$0 co-pay\*

Instant Savings Coupon Covers Patient Co-Pay†



There is no generic substitute for SOMA® 250 mg.

## \$0 co-pay coupons are available online!

Patients are heading your way. Print your coupons  
now at [www.SOMA250.com](http://www.SOMA250.com). Full terms and  
conditions are also available online.

†The \$0 co-pay offer is for eligible 3rd party insured patients only and limited to a maximum  
co-pay value of \$200.00. Additional restrictions apply. See [www.SOMA250.com](http://www.SOMA250.com).

**MEDA**  
PHARMACEUTICALS  
Meda Pharmaceuticals Inc.  
Somerset, New Jersey 08876-4120

© 2009 Meda Pharmaceuticals Inc. All rights reserved. [www.SOMA250.com](http://www.SOMA250.com) SOM9015 4/09

If you no longer wish to receive fax messages from this sender, please call (888) 739-4920, enter extension 1800 and follow the voice prompts.